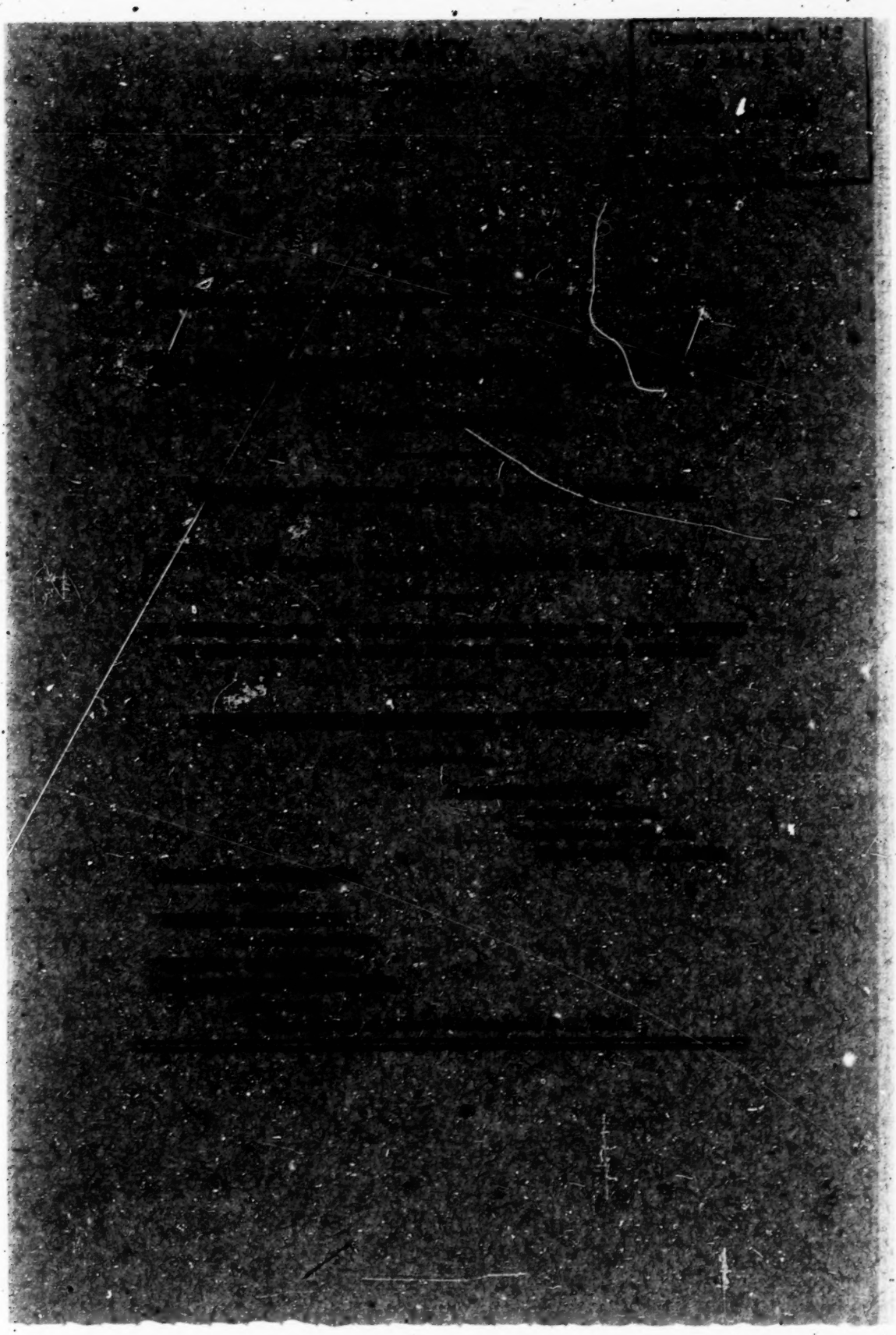


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In the Supreme Court of the United States

OCTOBER TERM, 1963

No. 347

WILLMARK SERVICE SYSTEM, INC., PETITIONER

v.

W. WILLARD WIRTZ, SECRETARY OF LABOR

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. 24–32) is reported at 317 F. 2d 486. The district court's findings and conclusions (R. 29–38) are not reported. Its memorandum decision (R. 10–26) is reported at 215 F. Supp. 577.

JURISDICTION

The judgment of the court of appeals was entered on May 16, 1963 (Pet. 33). The petition for a writ of certiorari was filed on August 8, 1963. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the two courts below correctly held that the investigative employees working out of petitioner's Minneapolis branch office are "engaged in commerce" or "in the production of goods for commerce" within the meaning of the Fair Labor Standards Act.

2. Whether the two courts below correctly held that petitioner's Minneapolis branch office is not a "retail or service establishment" within the exemption provided in § 13(a)(2) of the Act.

STATUTE INVOLVED

The pertinent provisions of the Fair Labor Standards Act of 1938, as amended, 52 Stat. 1060, 63 Stat. 910, 29 U.S.C. 201 *et seq.*, are printed in the petition for certiorari (Pet. 34–35).

STATEMENT

The Secretary of Labor brought this action to enjoin petitioner from violating the minimum wage, overtime, record-keeping and shipping provisions of the Fair Labor Standards Act with respect to petitioner's Minneapolis branch office employees (R. 1–4). Petitioner's answer denied that any of its Minneapolis employees were "engaged in commerce or in the production of goods for commerce" within the coverage of the Act (R. 6), and claimed that its Minneapolis branch office was in any event a "retail or service establishment" entitled to exemption under 13(a)(2) of the Act (R. 7).

1. Petitioner is a large, nationwide organization which provides a "shopping service" and other related services to business establishments throughout the United States and parts of Canada (R. 11, 29, 43–45). Most of the income of the Minneapolis branch comes from customers who are interstate chain organizations or out-of-state stores (R. 187–190). Included among its customers, in addition to many retail store chains, are such non-retail chain organizations as Household Finance Company engaged in the small loan business operating 800 branch offices in the United States (R. 113), and W. W. Grainger, Inc., operating a chain of wholesale warehouses "from coast to coast" (R. 96).

Petitioner itself is a chain organization. It has 29 branches located in 23 states (R. 29). The branches are controlled in detail by, and are wholly dependent upon, petitioner's central office which is located in New York (R. 29–30). All service contracts with customers are made by the New York office (R. 47), which also bills and receives payment from the customers, including those investigated by the Minneapolis branch (R. 29, 47–48). Most, if not all of petitioner's branches, including the Minneapolis branch, serve customers located in several different states. Thus, the investigative employees attached to the Minneapolis branch "shop" establishments located in Minnesota, Iowa, and parts of Canada (and formerly in Wisconsin) (R. 11).

The investigative employees, including the "shoppers" and their supervisors, work in crews. A crew consists of one male supervisor and two female shop-

pers. These employees enter the stores, establishments or locations of petitioner's various clients in the guise of ordinary customers (R. 31, 50, 141). They make purchases, ask questions about the merchandise or the services offered by the establishment, and make other inquiries likely to be made by the usual customer, in order to obtain information as to the courtesy, efficiency, ability and honesty of the clerk who attends them. In some instances, they obtain other information desired by particular clients (R. 105–106).

Upon completing an investigation, each crew member makes a written report, using one or more of the numerous different forms prescribed and furnished by the central office. One form is the "Selling Quotient Builders," usually called the "S.Q.B." report. Other reports include the "Refund Service Report," "Narrative Report," "Cashiering Report," "Tax Report," "Violation Report," and "Irregularity Report" (R. 12–13, 32–33).

A substantial percentage of all reports prepared by the Minneapolis shoppers and supervisors are, when prepared, destined for interstate transmission (Pet. 28; R. 33). The reports are a valuable aid to the central management of petitioner's interstate chain customers in helping them to appraise the operations of their various establishments and maintain more efficient service there. Among the chain organizations so using the reports and services of the investigative employees are the Lerner Company whose central office is in New York (R. 76–77), Associated Aviation Underwriters with its home office in New

York (R. 83–84), Maurice L. Rothschild & Company with its home office in Chicago (R. 89–90), Dr. Scholls Foot Comfort Shops, Inc., with its main office in Chicago (R. 94–95), W. W. Grainger, Inc., with its general office in Chicago (R. 96), Sears, Roebuck & Company which has a midwestern territorial office in Chicago (107–109), Household Finance Company with its home office in Chicago (R. 113–114), and The Custom Shop with executive offices in New York (R. 131). In some instances, the interstate transmission of the reports continues beyond delivery to the customer's out-of-state home office, since many of petitioner's customers send the reports to their district or regional supervisors or to their store managers with instructions as to suggested remedies for the deficiencies they disclose (R. 33).

Many of the reports prepared by petitioner's investigative employees go to petitioner's New York office as well as to the out-of-state offices of petitioner's customers. These are the "Irregularity Reports," which are used by petitioner to maintain a nationwide clearing house for inquiries from its customers as to the reliability of prospective employees. As the courts below found, petitioner's "Employees' Information File" contains hundreds of thousands of records listing the names of persons who have been found by Willmark's investigative employees to have committed irregularities (Pet. 28, R. 32). Petitioner's customers anywhere in the United States may send in the names and descriptions of their employees for a comparison check with these records (R. 45, 78, 92; Original Exh. 2A, sub. exhs. A and E).

Petitioner's Minneapolis investigative employees also handle and transport merchandise destined to be shipped across state lines. "Oftentimes," as the trial court found, the goods purchased by these employees "are taken by [them] to [petitioner's] branch office where the clerical employees return such merchandise to the home office or central warehouse of the customer located outside the State of Minnesota" (R. 34).

2. In support of its claim of exemption as a "retail or service establishment," petitioner sought to elicit opinion testimony that its business was "recognized as retail" in the industry. In addition to offering the opinion testimony of an expert witness and of four members of its industry, petitioner asked each customer representative who testified how he would classify its services—whether retail or wholesale. Nearly every one of these witnesses stated that he had not given the matter any thought until questioned about it in connection with this litigation (R. 80, 87–88, 111, 130, 134, 217). Petitioner's expert witness admitted that a specialized business service, such as that offered by petitioner, has not been "traditionally regarded as a retail service" (R. 165).

In rebuttal to petitioner's opinion evidence, the government offered the testimony of Dr. Robert S. Hancock, Associate Professor of Marketing at the University of Minnesota. Dr. Hancock testified that the shopping-service business was not classified as wholesale or retail but fell into the category of "business services not elsewhere classified" in the Standard Industrial Classification Manual prepared by the Bu-

reau of the Budget, and that petitioner's business was "quite alien to the traditional concept of a retail establishment and retailing services" (R. 233, 237).

3. Finding that the activities of the investigative employees "directly and vitally relate to [petitioner's] interstate activities" (R. 34), and that the investigative reports, although "not goods in ordinary parlance," constitute "the primary production of [petitioner's] far-flung business activities, and to all intent and purposes are the 'goods' which [petitioner] produces for its customers * * *" (R. 17), the district court held that the investigative employees were "engaged in commerce and in the production of goods for commerce" within the meaning of the Act. On the exemption issue, the district court held, as did the Third Circuit in *Goldberg* v. *Sorcas*, 294 F. 2d 841, 847, that a shopping-service business is "within the category of establishments which have never been recognized as making sales of services at retail," citing, *inter alia*, this Court's decision in *Mitchell* v. *Kentucky Finance Co.*, 359 U.S. 290. The court of appeals affirmed.

ARGUMENT

The decision below accords with a like decision of the Court of Appeals for the Third Circuit. It does not conflict with the decision of any other court of appeals, and is a correct application of the governing principles of this Court's decisions. Further review is unnecessary.

1. *Coverage.*—*a.* The coverage rulings below correctly apply the guiding principles repeatedly affirmed by

this Court's decisions from *Kirschbaum Co.* v. *Walling*, 316 U.S. 517, to *Alstate Construction Co.* v. *Durkin*, 345 U.S. 13, and reaffirmed in *Mitchell* v. *C. W. Vollmer & Co.*, 349 U.S. 427; *Mitchell* v. *Lublin, McGaughy & Asso.*, 358 U.S. 207; and *Mitchell* v. *Joyce Agency, Inc.*, 348 U.S. 945. See also *Western Union* v. *Lenroot*, 323 U.S. 490, at 502–503 (holding that "telegraph messages," "ideas, wishes, orders and inteligence" are all "subjects of commerce" and hence their preparation for interstate transmission constitutes "production of goods for commerce" within the Act). The rulings below are also clearly in accord with numerous other decisions of this Court in cases not arising under the Fair Labor Standards Act but nonetheless pertinent to the construction of this Act's coverage. See *North American Co.* v. *S.E.C.*, 327 U.S. 686, at 694–695 (a holding company's use of the "mails and facilities of interstate commerce" in order to "maintain its other relationships and contacts with its own subsidiaries," held to constitute interstate commerce); *Associated Press* v. *National Labor Relations Board*, 301 U.S. 103, at 128 ("[i]nterstate communication of a business nature, whatever the means of such communication, is interstate commerce * * *"); *International Text Book Co.* v. *Pigg*, 217 U.S. 91, at 107 ("intercourse or communication between persons in different States, by means of correspondence through the mails," is commerce among the States).

Petitioner's attempt to distinguish this Court's decisions on the ground that the "common denominator" of each is the "existence of 'goods' which are affected

or 'touched' in a direct or indirect sense by the services of the employees" (Pet. 21), is hardly more than a restatement of the Seventh Circuit's unsound reasoning in *Joyce* that the Act applied *only* to the "seal-checking guards" who physically touched the incoming and outgoing trucks. See *Mitchell* v. *Joyce Agency, Inc.*, 211 F. 2d 241, at 246, reversed, 348 U.S. 945. Here, moreover, the employees were themselves engaged in producing "goods" in the statutory sense under this Court's holding in the *Western Union* case, *supra*. In addition, they handled "goods" even in the sense used by petitioner (merchandise), some of which, like the "goods" of their own creation (reports), are transmitted out-of-state.[1]

Petitioner's assertions that the services of its investigative employees "relate entirely to the employees of retail establishments who are the ultimate consumers of Willmark" (Pet. 7) and that the "shoppers and supervisors perform work of a concededly local nature within one state" (Pet. 9), are contrary to the undisputed evidence in the record. As pointed out in the Statement, *supra*, p. 3, the shoppers and supervisors perform duties in Minnesota, Iowa, parts of Canada

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[1] In another attempt to breathe life into the Seventh Circuit's discredited decision in *Joyce Agency*, petitioner argues that the merchandise handled by the shoppers and supervisors is not shipped in interstate commerce "as a business transaction" (Pet. 7). This argument is also foreclosed by *Powell* v. *U.S. Cartridge Co.*, 339 U.S. 497, which expressly notes that commerce under § 3(b) of the Act includes "interstate transportation," and that the Act applies to employees engaged in the production of goods "for interstate transportation for use or consumption, as distinguished from transportation of them for sale or exchange." 339 U.S. at 512.

(and formerly in Wisconsin). Even when their activities are confined to Minnesota, there is here, just as there was in *Mitchell* v. *Kroger Company*, 248 F. 2d 935 (C.A. 8), "something more than local level or retail activity when the [shoppers and supervisors] travel from store to store and mail their various reports to the branch office" which transmits them on to the out-of-state home offices of both Willmark and its chain-store customers (*id.* at 939). As one witness states, the reports of the shoppers and supervisors "are the means of transmitting the service from the local level to our [central] office" (R. 95).

Application of the principle of "liberal construction" of the Act, with its coverage being "determined by practical considerations" (see *Vollmer*, 349 U.S. at 429), would permit of no other decision, we submit, than that reached by the courts below. Petitioner's contentions would require the Court to ignore not only the practical realities of the direct and integral relationship of the branch employees' activities to the conduct of petitioner's nationwide interstate business but also the direct interstate transmission of the product of the branch employees' work and the constant exchange of interstate communications between the branch office and the New York office.

b. The Fair Labor Standards Amendments of 1961 on which petitioner relies (Pet. 10) are wholly irrelevant to the bases of coverage on which the decision below is predicated. The purpose of the 1961 Amendments was to extend the Act's protection to additional employees of certain large "enterprises," some of whose employees were not theretofore subject

to the Act either because of the retail establishment exemption of § 13(a)(2) or because the particular individuals were not themselves engaged "in commerce" or in the "production of goods for commerce." The Amendments in no way curtailed the Act's "in commerce" basis of coverage as defined in § 3(b) or its "production of goods for commerce" phase of coverage as defined in §§ 3(i) and (j). Both grounds were left untouched and remain in full force and effect, and it is upon those grounds that the decision below rests.

c. The decision below is not in conflict with that of any other court of appeals. The only case directly in point on its facts is *Goldberg* v. *Sorvas*, 294 F. 2d 841 (C.A. 3), and in that case the same result was reached.[*] For its claim of conflict, petitioner relies primarily upon *Mitchell* v. *Welcome Wagon*, 232 F. 2d 892 (C.A. 6), and *Mitchell* v. *Household Finance Corp.*, 208 F. 2d 667 (C.A. 3), but those cases involved wholly different factual situations and have little bearing here. Even in their own contexts, moreover, those decisions are of dubious vitality today, for they rested upon narrow concepts of the Act's coverage which seem inconsistent with this

[*] The district court in that case had held (1) that the employees were otherwise covered by the Act but (2) that the enterprise was exempt as a "retail or service establishment." *Mitchell* v. *Sorvas*, 182 F. Supp. 800 (W.D. Pa.). On the Secretary's appeal from the exemption ruling, the court of appeals reversed and directed the entry of judgment in favor of the Secretary. Although it was open to the defendant to defend the judgment on any available ground, neither the defendant nor the court of appeals questioned the district court's ruling on the coverage question.

Court's later decisions in the *Volmer*, *Joyce*, and *Lublin* cases, *supra*. As the First Circuit observed in *Aetna Finance Co.* v. *Mitchell*, 247 F. 2d. 190, 192, commenting on the *Household Finance* decision, "we are not at all sure that it would be followed by the Third Circuit today, in view of the enlightenment to be derived from later decisions of the Supreme Court, particularly *Mitchell* v. *C. W. Volmer & Co., Inc.*"[3]

2. *Exemption.*—The holding below that petitioner's branch office is not "a retail or service establishment" eligible to qualify for exemption under § 13(a)(2) is sustained by the specific holding of *Mitchell* v. *Kentucky Finance Co.*, 359 U.S. 290, as well as by the long-settled principles, repeatedly reaffirmed by this Court, that exemptions from this Act, and particularly the § 13(a)(2) exemption, "are to be narrowly construed against the employers seeking to assert them," and that the burden of proof is upon the employer to show that his establishment is "plainly and unmistakably within their terms and spirit."

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[3] The district court decision in *Mitchell* v. *Krout*, 150 F. Supp. 857, 858 (N.D. Calif.), while somewhat closer on its facts, is also distinguishable. There, the investigators collected information which was used "to settle [accident] claims, prepare for trials, adjust marital matters, etc.," arising chiefly in the State of California. Moreover, Krout's business, unlike petitioner's, was not a nationwide organization, nor did it perform any central office function for multi-state chain organizations. It should be noted also that the Ninth Circuit has subsequently held that documents, such as plans and specifications, are "goods" within the meaning of the Act, and that employees working on such "goods" which have an out-of-state destination are covered by the Act. *Craig* v. *Far West Engineering Co.*, 265 F. 2d 251.

Arnold v. *Ben Kanowsky, Inc.*, 361 U.S. 388, 392; *Kentucky Finance Co., supra*, 359 U.S. at 295, *Phillips Co.* v. *Walling*, 324 U.S. 490, 493.

The decision below is plainly a sound application of the ruling in *Kentucky Finance* that the 1949 amendments did not expand the exemption to include businesses which were not "otherwise eligible under existing [pre–1949] concepts" to qualify as a "retail or service establishment" (359 U.S. at 294). The same "pre–1949 rulings and interpretations by the Administrator,"[4] cited by this Court in *Kentucky Finance* (*id.* at 292), included among the ineligible non-retail type of businesses (in addition to credit or loan businesses) "establishments engaged in supplying business, financial, and statistical reporting data, * * * adjustment and credit bureaus and collections agencies; credit-rating agencies; * * * [and] employment agencies" (1942 WH Manual, § 29, pp. 334–335). As pointed out by the Third Circuit in *Sorvas, supra*, the analogy between these services and petitioner's "shopping" service is "so striking as to be obvious" (294 F. 2d at 846).

Despite petitioner's vague assertions to the contrary (Pet. 18), there is no conflict among the courts of appeals on the exemption question. In addition to the Third Circuit's decision in *Sorvas* (which con-

[4] Interpretative Bulletin No. 6, Office of the Administrator of the Wage and Hour Division of the United States Department of Labor, "Retail and Service Establishments," June 14, 1941, Paragraph 29, 1942 WH Manual, pp. 326, 334.

[5] Petitioner's only concrete claim of a conflict is with the district court decision in the *Krout* case, discussed in note 3, *supra*.

cededly accords with the decision below in an indistinguishable fact situation), other recent court of appeals decisions similarly have held the exemption inapplicable to analogous specialized business services like that of petitioner. See *Telephone Answering Service, Inc.* v. *Goldberg*, 290 F. 2d 529 (C.A. 1) (telephone answering service), and *Goldberg* v. *Roberts*, 291 F. 2d 532 (C.A. 9) ("letter shop" engaged in addressing, stuffing and mailing letters for various business establishments).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

ARCHIBALD COX,
Solicitor General.

CHARLES DONAHUE,
Solicitor,

BESSIE MARGOLIN,
Associate Solicitor,

SYLVIA E. ELLISON,
CARUTHERS G. BERGER,
Attorneys,
United States Department of Labor.

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